

Lessons Learned on My Journey to the *Fisher Sports Brief*, and Beyond

By JAY ROSNER*

THANK YOU TO the University of San Francisco School of Law for holding this event dedicated to the issue of affirmative action. It is important we get together and discuss issues such as this.

In *Parents Involved in Community Schools v. Seattle School District No. 1*,¹ Chief Justice Roberts' opinion states, "[t]he way to stop discrimination based on race is to stop discriminating on the basis of race."² I love that Roberts quote, except he left out two words, and they are important: *against Whites*. What Roberts meant to say—but couldn't—was, let's stop discrimination *against Whites* by stopping discriminating *against Whites*.

I look around this room and I see a lot of White folks here. I would ask you to raise your hand if you have felt the stings of discrimination in this society for being white, but I do not want to make any attendees feel uncomfortable.

Let it suffice to say that even today, the instances of non-Whites in the United States facing discrimination based upon their race probably outnumbers the instances of Whites confronting the same by several orders of magnitude.³ It boggles the mind that "discrimination against Whites" has been the primary emphasis of the last thirty-five

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1. 551 U.S. 701 (2007).

2. *Id.* at 748.

3. See, e.g., News Release, U.S. Dep't of Labor, Office of Fed. Contract Compliance Programs, Judge Orders Bank of America to Pay Almost \$2.2 Million for Racial Discrimination Against More than 1,100 African-American Job Seekers (Sept. 23, 2013), *available at* <http://www.dol.gov/opa/media/press/ofccp/OFCCP20131967.htm>; Greg Toppo, *Report Shows Minority Students Suspended at Higher Rates*, USA TODAY (Oct. 5, 2011, 12:59 AM), <http://usatoday30.usatoday.com/news/education/story/2011-10-04/minority-students-face-more-suspensions/50661220/1> (explaining that minority students in public school face a higher rate of suspension than white students).

years of the Supreme Court's college admissions litigation.⁴ Only in the Twilight Zone⁵ would that make sense; however, it is understandable that in our tough economic times that feature some prominent, wealthy minority entertainers, and athletes, struggling Whites can feel that maybe their race is part of their predicament. The irony is that otherwise-comfortable Whites seeking access to elite institutions are almost always the people bringing these "discrimination against Whites" claims.⁶ They hardly represent the downtrodden.

I. The Amici Filings in *Fisher*

The total amici filings in *Fisher v. University of Texas at Austin*⁷ consisted of seventeen briefs supporting petitioner Fisher,⁸ and seventy-three briefs supporting affirmative action and respondent University of Texas at Austin.⁹ The seventy-three amicus briefs filed by those supporting affirmative action included one filed jointly by the National Association of Basketball Coaches ("NABC"),¹⁰ Women's Basketball

4. See, e.g., *Univ. of Cal. Regents v. Bakke*, 438 U.S. 265 (1978); *Hopwood v. Texas*, 236 F.3d 256 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 2550 (2001); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013); see also *Affirmative Action: Court Decisions*, NATIONAL CONFERENCE OF STATE LEGISLATURES BLOG (June 2013), <http://www.ncsl.org/research/education/affirmative-action-court-decisions.aspx>.

5. *The Twilight Zone* is an American television series "of unrelated stories containing drama, psychological thriller, fantasy, science fiction, suspense, and/or horror, often concluding with a macabre or unexpected twist." *The Twilight Zone*, WIKIPEDIA, http://en.wikipedia.org/wiki/The_Twilight_Zone (last visited Oct. 5, 2013). In popular culture, "twilight zone" is used to describe "[a]n area of ambiguity between two distinct states or conditions." *Twilight Zone*, THE FREE DICTIONARY BY FARLEX, <http://www.thefreedictionary.com/twilight+zone> (last visited Oct. 5, 2013).

6. See, e.g., Nikole Hannah-Jones, *A Colorblind Institution: What Abigail Fisher's Affirmative Action Case is Really About*, PROPUBLICA (Mar. 18, 2013, 11:25 AM), <http://www.propublica.org/article/a-colorblind-constitution-what-abigail-fishers-affirmative-action-case-is-r> (stating that Fisher was raised in suburban Texas and both her sister and father attended The University of Texas at Austin); *Regents of the University of California v. Bakke*, WIKIPEDIA, http://en.wikipedia.org/wiki/Regents_of_the_University_of_California_v._Bakke (last visited Oct. 29, 2013) (stating that Bakke was an engineer and former Marine officer).

7. 133 S. Ct. 2411 (2013).

8. Office of the Vice President for Legal Affairs, *Fisher v. Texas*, THE UNIVERSITY OF TEXAS AT AUSTIN, <http://www.utexas.edu/vp/irla/Fisher-V-Texas.html> (last updated Oct. 25, 2013).

9. *Id.*

10. The National Association of Basketball Coaches, located in Kansas City, Missouri, is an American organization of college, junior college, and high school men's basketball coaches. See *What is the NABC and What Does it Do?*, NABC, <http://www.nabc.com/about/index> (last visited Sept. 7, 2013).

Coaches Association (“WBCA”),¹¹ and the Black Coaches & Administrators (“BCA”).¹² The three organizations represent over 12,000 current and former collegiate basketball coaches and collegiate athletic administrators.¹³ Additionally, forty-three individual coaches signed the brief, including national champion titleholders Tom Izzo and Orlando “Tubby” Smith,¹⁴ as well as two distinguished bay area coaches—Johnny Dawkins of Stanford University and Mike Montgomery of University of California at Berkeley.¹⁵

Here is a short breakdown of the amici: supporting affirmative action were the U.S. Government and 15 state governments; 57 Fortune 100 companies; over 100 public and private universities; 37 generals and other military leaders; over 100 members of Congress and other state and federal elected officials; over a dozen religious organizations and campus ministries; and more than 500 individual academic scholars.¹⁶ Opposing affirmative action were no governments, no universities, no large corporations, no religious organizations, one former military leader (controversial former Congressman Allen West¹⁷), and only four individual scholars.¹⁸

11. The Women’s Basketball Coaches Association is an organization dedicated to “promot[ing] women’s basketball by unifying coaches at all levels to develop a reputable identity for the sport . . . and to foster and promote the development . . . of basketball as a sport for women and girls.” *Welcome to the Women’s Basketball Coaches Association (WBCA)*, WBCA, <http://www.wbca.org> (last visited Sept. 9, 2013).

12. Brief for Nat’l Ass’n of Basketball Coaches et al. as Amici Curiae Supporting Respondents at 2, *Fisher*, 133 S. Ct. 2411 (No. 11-345), 2012 WL 3527854 [hereinafter NABC Brief]. The Black Coaches & Administrators (“BCA”) is an organization of over 4000 members devoted to generating “an atmosphere of diversity and inclusion in all sports from high school to college, including the professional leagues.” *Id.*

13. *Id.* at 1.

14. Both Tom Izzo and Orlando “Tubby” Smith have won national championships. *Tom Izzo*, WIKIPEDIA, http://en.wikipedia.org/wiki/Tom_Izzo (last visited Sept. 9, 2013); *Tubby Smith*, WIKIPEDIA, http://en.wikipedia.org/wiki/Tubby_Smith (last visited Sept. 9, 2013).

15. NABC Brief, *supra* note 12, at cover page.

16. Office of the Vice President for Legal Affairs, *supra* note 8.

17. *Id.* During his short tenure in the U.S. House of Representatives, Allen West earned a reputation for making controversial statements. See Zachary Bernstein, *Rep. Allen West’s 15 Most Outrageous Statements*, THINKPROGRESS (Feb. 16, 2012, 12:00 PM), <http://thinkprogress.org/politics/2012/02/16/417174/allen-west-15-worst-quotes/>.

18. Office of the Vice President for Legal Affairs, *supra* note 8. The seventeen amici opposing affirmative action were: (1) Texas Association of Scholars, (2) The Center for Individual Rights, (3) The Honorable Allen B. West, (4) Mountain States Legal Foundation, (5) American Civil Rights Union, (6) California Association of Scholars, et al., (7) Abigail Thernstrom, et al., (8) Scholars of Economics and Statistics, (9) Southeastern Legal Foundation, Inc., (10) Current and Form Federal Civil Rights Officials, (11) Judicial Watch, Inc. & Allied Educational Foundation, (12) Louis D. Brandeis Center for Human Rights Under Law, et al., (13) Asian American Legal Foundation & the Judicial Education

Think of what this seventeen to seventy-three amicus-filing imbalance may represent. I am saddened that our conservative brothers and sisters opposing affirmative action could not convince any businesses, governments, universities, or religious organizations to file an amicus brief.¹⁹ Maybe they did not try? Maybe none of those entities were interested in opposing affirmative action.

Hundreds of our largest and most important public and private entities took a careful look at affirmative action and were willing to go on record supporting it.²⁰ No large, important institution would go on record opposing affirmative action.²¹ That task was left to a very few individuals and small advocacy groups.²²

There is a bit of a dichotomy here. One might conclude that this imbalance implies that the United States public is broadly and deeply in support of affirmative action; however, six of seven state initiatives banning affirmative action have been passed, some by relatively wide margins.²³ One possible explanation is that antagonism against minorities and their access to selective colleges can be easily expressed in the privacy of a voting booth, but the antagonism-racism position gets no traction in broader public discussions.

Project, (14) Cato Institute, (15) The American Center for Law and Justice, (16) Gail Heriot and other members of the United States Commission on Civil Rights, (17) Pacific Legal Foundation. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. California (1996), Washington (1998), Michigan (2006), Oklahoma (2008), Nebraska (2008), and Arizona (2010) passed state ballot initiatives banning affirmative action. See *California Affirmative Action, Proposition 209 (1996)*, BALLOTPEdia, [http://ballotpedia.org/wiki/index.php/California_Affirmative_Action,_Proposition_209_\(1996\)](http://ballotpedia.org/wiki/index.php/California_Affirmative_Action,_Proposition_209_(1996)) (last modified Sept. 3, 2013); *Washington Affirmative Action Ban, Initiative 200 (1998)*, BALLOTPEdia, [http://ballotpedia.org/wiki/index.php/Washington_Affirmative_Action_Ban,_Initiative_200_\(1998\)](http://ballotpedia.org/wiki/index.php/Washington_Affirmative_Action_Ban,_Initiative_200_(1998)); *Michigan Civil Rights Amendment, Proposal 2 (2006)*, BALLOTPEdia, [http://ballotpedia.org/wiki/index.php/Michigan_Civil_Rights_Amendment,_Proposal_2_\(2006\)#Text](http://ballotpedia.org/wiki/index.php/Michigan_Civil_Rights_Amendment,_Proposal_2_(2006)#Text) (last modified Sept. 23, 2013) [hereinafter *Michigan Civil Rights Amendment*]; *Oklahoma Affirmative Action Ban Amendment, State Question 759 (2012)*, BALLOTPEdia, [http://ballotpedia.org/wiki/index.php/Oklahoma_Affirmative_Action_Ban_Amendment,_State_Question_759_\(2012\)](http://ballotpedia.org/wiki/index.php/Oklahoma_Affirmative_Action_Ban_Amendment,_State_Question_759_(2012)) (last modified Feb. 20, 2013); *Nebraska Civil Rights Initiative, 424 (2008)*, BALLOTPEdia, [http://ballotpedia.org/wiki/index.php/Nebraska_Civil_Rights_Initiative,_424_\(2008\)](http://ballotpedia.org/wiki/index.php/Nebraska_Civil_Rights_Initiative,_424_(2008)) (last modified Sept. 3, 2013); *Arizona Civil Rights Amendment, Proposition 107 (2010)*, BALLOTPEdia, [http://ballotpedia.org/wiki/index.php/Arizona_Civil_Rights_Amendment,_Proposition_107_\(2010\)](http://ballotpedia.org/wiki/index.php/Arizona_Civil_Rights_Amendment,_Proposition_107_(2010)) (last modified Aug. 14, 2012). A similar ballot initiative was defeated in Colorado in 2008. See *Colorado Civil Rights Initiative, Amendment 46 (2008)*, BALLOTPEdia, [http://ballotpedia.org/wiki/index.php/Colorado_Civil_Rights_Initiative,_Amendment_46_\(2008\)](http://ballotpedia.org/wiki/index.php/Colorado_Civil_Rights_Initiative,_Amendment_46_(2008)) (last modified Sept. 3, 2013).

II. Lessons Learned from the Sports World

I played basketball in high school. During games I typically sat on the bench, getting very little playing time. Though I did not play basketball in college, I have always been a fan of the sport. Twenty years after college I became an SAT/ACT consultant to the NABC. The NABC retains an SAT/ACT consultant because it is very concerned about the impact students' test scores have on their initial eligibility index.²⁴ Incoming college freshmen must meet certain GPA and test score requirements in order to be eligible to compete in most college sports programs.²⁵

One important lesson I have learned through interacting with the sports world and with the NABC is this: while the sports world is largely a corporate and conservative culture, the NABC brief is a reminder that there is incredible progressive potential within sports.

A. The *Real* Affirmative Action

In terms of my own education, I am an affirmative action recipient. Though I am a White male, my high SAT score qualified me to receive the *real* affirmative action—the type of affirmative action triggered by high test scores.²⁶ I believe that the influence of test scores in admissions impacts 50%–80% of the incoming freshman class of selective and highly selective colleges. That is why I call it the “real affirmative action.” My sense is that the kind of affirmative action we are talking about today—race-conscious affirmative action—impacts 5%–8% of an incoming college freshman class. While this percentage is incredibly significant for racial and ethnic diversity, I believe that it pales in comparison to the impact of the affirmative action I received based upon my high SAT scores.

To be clear: high SAT or ACT scores are not alone sufficient to be admitted to a selective or highly selective college. A successful applicant must also have good grades and other positive attributes; but high test scores are virtually always necessary for admission at that level.

24. See *Academic Standards*, NAT'L COLLEGIATE ATHLETIC ASS'N, <http://www.ncaa.org/wps/wcm/connect/public/ncaa/eligibility/becoming+eligible/academic+standards> (last modified Sept. 13, 2013) (stating that in order for a student to be eligible for Division I or II college sports, the student must earn a qualifying score on either the SAT or ACT).

25. *Id.*

26. See, e.g., *Admission by Exam*, UNIVERSITY OF CALIFORNIA, <http://admission.universityofcalifornia.edu/freshman/requirements/examination/index.html> (last visited Oct. 28, 2013).

The reason I benefitted from the real affirmative action: I grew up in an upper-middle class family.²⁷ I had nothing to do with that. It was not my choice; it was my lot in life. The very high correlation between socioeconomic status and high SAT scores²⁸ made it much more likely that someone like me would benefit from the real affirmative action. The SAT, LSAT, and multistate portion of the bar exam were all administered in multiple-choice format, and I performed well on those exams; however, throughout my teaching career I have observed and learned that the multiple-choice testing format *was* a challenge for students of other races and ethnicities.

B. The Problem with Standardized Testing

At the very start of my career, I taught mathematics at a diverse public high school with students from both city and suburban environments. I saw firsthand the effects of the segregated K–12 education we have in this country. In the early 1970s, I began noticing that too many African American students had difficulties taking standardized tests like the SAT.

Those difficulties seemed to exceed even the differences one would expect to arise from gaps in educational resources and experiences between White and African American students. I always suspected that the structure and content of the SAT and other admissions tests were themselves factors in increasing gaps. It was not until I began doing research to prepare myself as an expert witness in the 2001 *Grutter v. Bollinger*²⁹ trial that I was able to quantify some of the skewing effects internal to the tests.³⁰ It is well known that White students outperform African American students on the SAT.³¹ My re-

27. See *Income-Based Affirmative Action Will Do Almost Nothing to Produce Greater Racial Diversity in Public Schools or in Colleges and Universities*, JOURNAL OF BLACKS IN HIGHER EDUCATION (2007), http://www.jbhe.com/news_views/56_income-based_action.html.

28. Paul Sackett et al., *Socioeconomic Status and the Relationship Between the SAT and Freshman GPA: An Analysis of Data from 41 Colleges and Universities*, in RESEARCH REPORTS 6 (Coll. Bd., Report No. 2009-1, 2009), available at <http://research.collegeboard.org/sites/default/files/publications/2012/9/researchreport-2009-1-socioeconomic-status-sat-freshman-gpa-analysis-data.pdf>.

29. 137 F. Supp. 2d 821 (E.D. Mich. 2001).

30. Expert report of Jay Rosner, *Grutter*, 137 F. Supp. 2d 821 (No. 97-75928), reprinted in 12 BERKELEY LA RAZA L.J. 377 (2001) [hereinafter Expert Report of Jay Rosner]; Jay Rosner, *The SAT: Quantifying the Unfairness Behind the Bubbles*, in SAT WARS: THE CASE FOR TEST-OPTIONAL COLLEGE ADMISSIONS 104 (Joseph A. Soares ed., Teachers College Press 2012); see also William C. Kidder & Jay Rosner, *How the SAT Creates "Built-In Headwinds": An Education and Legal Analysis of Disparate Impact*, 43 SANTA CLARA L. REV. 131, 144-45 (2002).

31. See Rosner, *supra* note 30, at 104; *The Widening Racial Scoring Gap on the SAT College Admissions Test*, JOURNAL OF BLACKS IN HIGHER EDUCATION (2005), <http://www.jbhe.com/>

search into SAT “item level data”—which details the performance of each individual SAT question³²—found that “[t]he College Board drops questions [from the scored sections of the SAT] if they tend to be answered incorrectly by students who otherwise do well on the test—or if they tend to be answered correctly by students who otherwise do poorly.”³³ What that means is that every question chosen for the scored sections of the SAT has been answered correctly by a higher percentage of Whites than African Americans in pretesting.³⁴ In other words, if African Americans do better than Whites on a pretested question, that question is disqualified for use on the SAT.³⁵

Hoping to alter standardized testing inequalities, I have been involved in educational litigation over the years. As a young attorney I brought suit on behalf of individual students against the Educational Testing Service (“ETS”),³⁶ and in a subsequent action, the Law School Admission Council (“LSAC”).³⁷ Although there were losses early on, later I was a member of the legal team responsible for the only two victories by individual students against ETS.³⁸

Participation in educational litigation led to my involvement in standardized test preparation, in which I have been involved for over twenty-five years. Currently, I serve as the Executive Director of The Princeton Review Foundation, which advocates for test fairness, and provides resources, information, and test preparation courses to un-

features/49_college_admissions-test.html; Scott Jaschik, *SAT Scores Drop Again*, INSIDE HIGHER ED (Sept. 25, 2012), <http://www.insidehighered.com/news/2012/09/25/sat-scores-are-down-and-racial-gaps-remain>.

32. See Rosner, *supra* note 30, at 105.

33. Peter Coy, *What's Holding American Students Back? The SAT*, BLOOMBERG BUSINESSWEEK (Oct. 3, 2013), <http://www.businessweek.com/articles/2013-10-03/sat-act-college-admissions-tests-are-holding-american-students-back#p1>; see also Rosner, *supra* note 30, at 114-15.

34. See Rosner, *supra* note 30, at 114-15.

35. *Id.*

36. DAVID OWEN, *NONE OF THE ABOVE: BEHIND THE MYTH OF SCHOLASTIC APTITUDE* 164-66 (Houghton Mifflin 1985); see also *Frequently Asked Questions: Who is ETS*, ETS, <http://www.ets.org/about/faq> (last visited Sept. 9, 2013) (explaining that the Education Testing Service develops, administers, and scores tests such as the GRE).

37. OWEN, *supra* note 36 (explaining that, at the time of Petitioner's suit, the LSAC sponsored the LSAT, but the ETS prepared and administered the test); *Law School Admission Exam Being Revamped*, NASHUA TELEGRAPH (New Hampshire), May 14, 1981, at 24, available at <http://news.google.com/newspapers?nid=2209&dat=19810513&id=N6krAAAAIBAJ&sjid=IP0FAAAAIBA&pg=7171,3206406>; *About LSAC*, LSAC, <http://www.lsac.org/about-lsac/about-lsac> (last visited Sept. 9, 2013) (explaining that the LSAC provides products and services, such as LSAT administration, for law schools and law school applicants).

38. *Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384 (1995); *Cortale v. Educ. Testing Serv.*, 251 A.D.2d 528 (N.Y. App. Div. 1998).

derrepresented minority students.³⁹ In addition to high school SAT and ACT preparation, The Princeton Review Foundation also provides assistance at the collegiate level, offering preparation, resources, and courses for the GRE, LSAT, GMAT, and MCAT exams.⁴⁰

In 2001, I provided expert witness testimony regarding national admissions tests at the trial of *Grutter v. Bollinger* in the United States District Court for the Eastern District of Michigan.⁴¹ As a result of all these experiences, I have concluded that standardized tests are the driving force making affirmative action necessary. Sigal Alon, a professor at Tel Aviv University, and Marta Tienda, a professor at Princeton University, reached the same conclusion in their article, *Diversity, Opportunity, and the Shifting Meritocracy in Higher Education*, published in the *American Sociological Review*.⁴² Alon and Tienda concluded that the increasing weight placed upon admissions tests requires affirmative action as a corrective: “Our analyses demonstrate that the emergence of a test-score meritocracy amid pervasive test score gaps required selective institutions to give underrepresented minorities an admission boost to achieve campus diversity. The seemingly inevitable tension between merit and diversity exists only when merit is narrowly defined by SAT scores.”⁴³

39. *About Us*, PRINCETON REVIEW FOUNDATION, <http://www.princetonreview.com/about-us.aspx> (last visited Aug. 30, 2013).

40. *Id.* The Graduate Record Examination (“GRE”) is a standardized test that is an admissions requirement for many graduate schools. *See* ETS, <http://www.ets.org/gre> (last visited Sept. 12, 2013) (explaining that the Education Testing Service develops, administers, and scores tests such as the GRE). The Law School Admission Test (“LSAT”) is a standardized test that is a requirement for law school admissions in the United States, Canada, and other countries. *See About the LSAT*, LSAC, <http://www.lsac.org/jd/lsat/about-the-lsat> (last visited Sept. 12, 2013). The Graduate Management Admission Test (“GMAT”) is a standardized test that is an admissions requirement for many graduate management programs, such as MBA programs. *See Graduate Management Admission Test*, WIKIPEDIA, <http://en.wikipedia.org/wiki/GMAT> (last visited Sept. 12, 2013). The Medical College Admission Test (“MCAT”) is a standardized admissions test for prospective medical students in the United States and Canada. *See Medical College Admissions Test® (MCAT®)*, AMERICAN ASSOCIATION OF MEDICAL COLLEGES, <https://www.aamc.org/students/applying/mcat/> (last visited Sept. 12, 2013).

41. *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001); *see also* Expert report of Jay Rosner, *supra* note 30.

42. Sigal Alon & Marta Tienda, *Diversity, Opportunity, and the Shifting Meritocracy in Higher Education*, 72 AM. SOC. REV. 487, 507-08 (2007).

43. *Id.* (citations omitted).

C. The Origins of the *Fisher* Sports Brief

In 2006, African American basketball coach Ernie Zeigler⁴⁴ asked me, “What can I do about Michigan Proposal 2 (the Michigan Civil Rights Initiative)?⁴⁵ I used to live and work in California, and the civil rights initiative means getting rid of affirmative action. I want to oppose that.”

Zeigler’s question resulted in our subsequent partnership with the NABC, WBCA, and BCA to oppose several state anti-affirmative action initiatives.⁴⁶ Because of this partnership, those organizations were willing to file an amicus brief in *Fisher*.⁴⁷

Our anti-affirmative action opponents are engaging in a reversal of the process that Thurgood Marshall followed. Marshall gradually chipped away at segregation over a term of years.⁴⁸ I see our conservative colleagues attempting to chip away at affirmative action by bringing lawsuits that essentially claim discrimination against Whites in college admissions.⁴⁹ Have so many Whites suffered from discrimination in admissions to warrant thirty-five years of Supreme Court concentration on the issue? I think not. “Discrimination against Whites” is never said because it sounds either ridiculous or racist—that is why

44. *Ernie Zeigler*, WIKIPEDIA, http://en.wikipedia.org/wiki/Ernie_Zeigler (last visited Sept. 9, 2013).

45. *Michigan Civil Rights Amendment*, *supra* note 23. The Michigan Civil Rights Amendment sought to ban affirmative action programs in education and public sector jobs. *Id.* Although the proposal was approved by voters, the Court of Appeals for the Sixth Circuit later overturned it. *Coalition to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 701 F.3d 466, 491 (6th Cir. 2012).

46. *Who Supports Affirmative Action*, ACLU (Oct. 21, 2008), available at https://www.aclu.org/sites/default/files/images/asset_upload_file670_37287.pdf; *WBCA Stands with the NABC to Oppose “Civil Rights Initiatives” Proposed in Ariz., Colo. and Neb.*, NABC (Sept. 15, 2008), <http://www.wbca.org/blog/index.cfm/2010/6/29/WBCA-Stands-with-the-NABC-to-Oppose-Civil-Rights-Initiatives-Proposed-in-Ariz-Colo-and-Neb/>.

47. NABC Brief, *supra* note 12.

48. *See, e.g., Smith v. Allwright*, 321 U.S. 649 (1944) (extending voting rights and desegregation by holding that voting in primary elections cannot be restricted to any race); *Morgan v. Virginia*, 328 U.S. 373 (1946) (successfully overturning segregation laws for interstate buses); *Sweatt v. Painter*, 339 U.S. 629 (1950) (holding that state law schools must accept applicants regardless of race even if “separate but equal” schools exist); *McLaurin v. Okla. State Regents*, 339 U.S. 637 (1950) (holding that a public institution of higher learning could not provide different treatment to a student solely because of his or her race); *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954) (Supreme Court ruling that “separate but equal” public education was not applicable to public education because it could never be truly equal).

49. *Univ. of Cal. Regents v. Bakke*, 438 U.S. 265 (1978); *Hopwood v. Texas*, 236 F.3d 256 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 2550 (2001); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013).

Chief Justice Roberts left “against Whites” out of that otherwise wonderful-sounding quote.⁵⁰

My colleagues and I are defending the modicum of integration in selective university programs that affirmative action has produced—in the states in which it still can be used. The relatively small numbers of underrepresented minority students that exist on selective college campuses have significantly declined at University of California, Los Angeles (“UCLA”)⁵¹ and University of California, Berkeley (“UC Berkeley”)⁵² because of the California Civil Rights Initiative enacted in 1996—otherwise known as Proposition 209.⁵³ Proposition 209 amended the California state constitution to prohibit state government institutions from considering “race, sex, color, ethnicity, or national origin” in the areas of public employment, public contracting, and public education.⁵⁴

The NABC brief in *Fisher* indicates that participation in sports previously was one of the most “exclusionary domains [in] American life.”⁵⁵ The transition of sports to a more integrated, diversified context provides some lessons for the more inclusive direction in which universities should move.

The question remains: What should be done after the Supreme Court’s decision in *Fisher*? It is possible that coaches in other sports, and at other institutional levels, may be interested in fighting to keep affirmative action alive, but I am not sure. This is new turf, and I welcome suggestions.

In 1994, Governor Pete Wilson sponsored California Proposition 187—an anti-illegal immigration bill intended to deny undocumented students public education.⁵⁶ This produced a backlash among the Cal-

50. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

51. Erica Perez, *Despite Diversity Efforts, UC Minority Enrollment Down Since Prop. 209*, CALIFORNIA WATCH (Feb. 24, 2012), <http://californiawatch.org/dailyreport/despite-diversity-efforts-uc-minority-enrollment-down-prop-209-15031>. Although the percentage of underrepresented minority students enrolled at UCLA and UC Berkeley has recovered some since the passage of Proposition 209, most groups have not fully recovered to pre-Proposition 209 numbers. See *University of California Application, Admissions and Enrollment of California Resident Freshman for Fall 1989 Through 2010*, UNIVERSITY OF CALIFORNIA, OFFICE OF THE PRESIDENT (Mar. 2011), available at http://www.ucop.edu/news/factsheets/flowfrc_10.pdf.

52. Perez, *supra* note 51.

53. *Proposition 209: Text of Proposed Law*, CALIFORNIA’S 1996 GENERAL ELECTION WEB SITE, <http://vote96.sos.ca.gov/bp/209text.htm> (last visited Sept. 12, 2013).

54. *Id.*; CAL. CONST. art. I, § 31.

55. NABC Brief, *supra* note 12, at 2.

56. 1994 Cal. Legis. Serv. Prop. 187 (West). Proposition 187 was enacted by referendum and subsequently codified in: CAL. PENAL CODE §§ 113, 114, 834(b) (West Cum.

ifornia Latino electorate⁵⁷ and resulted in Democratic dominance of California politics to this day.⁵⁸ If affirmative action is eliminated or constricted, could this political pushback occur on a national level?

If affirmative action is constricted, I believe that state flagship universities will either have to go test-optional or they will experience a significant decline in underrepresented minorities on the undergraduate level—as UC Berkeley and UCLA have⁵⁹—and even fewer underrepresented minorities on the graduate and professional levels.

Ironically, while this is mainly an issue of race now, the *Fisher* ruling does not affect just consideration of race and/or ethnicity. It also impacts consideration of gender. If the Supreme Court justices rule to abandon affirmative action in *Fisher*, five male Supreme Court justices may be taking away a tool that males may really need in the not-too-distant future. The gender gap is closing, and in areas such as college attendance rates and graduation rates, females are increasingly outperforming their male counterparts.⁶⁰

Conclusion

Affirmative action can be compared to democracy. Both are complicated systems that are problematic and messy; moreover, they are each better than any available alternative—with affirmative action having been shown to be more effective in increasing the number of underrepresented students than any other single method.

Supp. 1996); CAL. WELF. & INST. CODE § 10001.5 (West Cum. Supp. 1996); CAL. HEALTH & SAFETY CODE § 130 (West Cum. Supp. 1996); CAL. EDUC. CODE §§ 48215, 66010.8 (West Cum. Supp. 1996); CAL. GOV'T CODE § 53069.65 (West Cum. Supp. 1996).

57. See William Schneider, *Prop 187's Backlash*, AMERICAN ENTERPRISE INSTITUTE (Aug. 7, 1999), <http://www.aei.org/article/politics-and-public-opinion/elections/prop-187s-backlash/>.

58. See *id.* Arnold Schwarzenegger, however, temporarily broke the Democratic dominance in California by being the first Republican to win a state election since the passage of Proposition 187. See Gebe Martinez, *Learning from Proposition 187: California's Past is Arizona's Prologue*, CENTER FOR AMERICAN PROGRESS (May 5, 2010), <http://www.american-progress.org/issues/immigration/news/2010/05/05/7847/learning-from-proposition-187/>.

59. Perez, *supra* note 51.

60. See Daniel Borzelleca, *The Male-Female Ratio in College*, FORBES (Feb. 16, 2012), <http://www.forbes.com/sites/ccap/2012/02/16/the-male-female-ratio-in-college/>; Denise Du Vernay, *Why Are More Women than Men Graduating from College?*, EXAMINER (Sept. 11, 2012), <http://www.examiner.com/article/why-are-more-women-than-men-graduating-from-college>.

After the *Fisher* Decision

Postscript after the announcement of the Supreme Court's decision in *Fisher*:

Pundits have posited a wide range of interpretations of the Court's *Fisher* opinion. Those favoring affirmative action appreciate the Court's confirmation that diversity is a compelling interest.⁶¹ Others feel that the Court punted,⁶² while opponents of affirmative action note that the Court has potentially constricted affirmative action by no longer deferring to universities' representation of the narrow tailoring of their use of race-conscious methods.⁶³ My primary concern is that if this constriction makes affirmative action less effective, opportunities for underrepresented minority students will diminish in states that still permit affirmative action.

With the Court remanding *Fisher* to the lower court for further proceedings, all these issues might be reargued in a reappearance of *Fisher* in the Supreme Court in a year, or two, or three. My hope is that public understanding of, and support for, affirmative action can be significantly enhanced in the intervening period, resulting in a positive impact on any reconsideration by the Court.

61. Michael Stratford, *Affirming Affirmative Action*, INSIDE HIGHER ED (Sept. 30, 2013), <http://www.insidehighered.com/news/2013/09/30/us-says-its-guidance-affirmative-action-still-stands-after-fisher-decision> ("Proponents of race-conscious admissions emphasized that a majority of justices reaffirmed that diversity in higher education provides important educational and social benefits and that colleges have a compelling interest in seeking to foster such diversity on their campuses.").

62. See Daniel Fisher, *SCOTUS Upholds Affirmative Action, in Theory at Least*, FORBES (June 24, 2013), <http://www.forbes.com/sites/danielfisher/2013/06/24/affirmative-action/>.

63. See Ilya Somin, *Preliminary Thoughts on Fisher v. Univ. of Texas*, VOLOKH CONSPIRACY (June 24, 2013, 11:31 AM), <http://www.volokh.com/2013/06/24/preliminary-thoughts-on-fisher-v-university-of-texas/>.